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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MONIQUE CLAPHAN,

Defendant and Appellant.

E033845

(Super.Ct.Nos. FVA015719 &  
FVA017491)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael R. Libutti,  
Judge. Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Gary W. Schons, Senior Assistant Attorney General, Meagan J. Beale,  
Supervising Deputy Attorney General, and Kyle Niki Shaffer, Deputy Attorney General,  
for Plaintiff and Respondent.

Defendant Monique Claphan appeals contending the trial court abused its discretion in denying her request to recall a witness, who was excused subject to recall, as a defense witness. We disagree and affirm.

### **FACTS AND PROCEDURAL HISTORY**

An amended information was filed against defendant Monique Claphan and two codefendants, Gloria and Veronica Garcia, on September 4, 2002, charging her with (1) kidnapping (Pen. Code, § 207), (2) assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), and (3) making criminal threats (Pen. Code, § 422). Suean Roby was the alleged victim. The following month, a jury found defendant guilty as charged on count 3, and guilty of lesser included offenses of false imprisonment and misdemeanor assault in counts 1 and 2.

Roby was temporarily residing in defendant's home in May 2002. On May 19, defendant requested Roby to sell methamphetamine for her. Thereafter, Roby left in a car with Patricia Mendez, defendant's cousin who was living with defendant. Roby made no attempt to sell the methamphetamine. When Roby returned home, defendant was angry at Roby for being gone for a long time and for failing to sell the drugs. Defendant restricted Roby to her room. Roby then began to pack her belongings.

The following morning, codefendants came to collect money from Roby. They entered the home and attacked her, kicking and punching her. Roby attempted to escape, but defendant and codefendants pulled her to the floor where they continued to attack her. Defendant threatened to kill Roby and Roby's children. Defendant duct-taped

Roby's hands behind her back, put a blanket over her head, and walked her outside with the codefendants. Defendant told codefendants she did not care what they did with Roby or where they buried her. The codefendants drove Roby around for some time before they forced her out of the car wearing only her underwear.

Officer Brian McLane interviewed Roby and Mendez on May 20, 2002, and testified at trial that Roby's version of events during the interview was "fairly consistent" with her testimony at trial. Among other things, at trial Roby testified Mendez was not in the room during the assault; however, she did testify Mendez brought duct tape and a blanket to defendant.

In contrast, Officer McLane testified that Mendez's version of events during the interview was not consistent with her testimony at trial. Mendez testified as a prosecutorial witness that (1) she did not tell the police about an assault incident, (2) did not see an assault, (3) did not recognize one of the codefendants in the courtroom, and (4) did not assist in any assault. In the version Mendez gave to McLane: (1) codefendant Gloria woke her up while she was looking for Roby, (2) codefendant Gloria woke up defendant and continued to look for Roby, finding Roby in the bathroom, (3) codefendant Gloria started hitting Roby, (4) codefendant Veronica entered the home and started to hit Roby, (5) defendant was involved in assaulting Roby, (6) Mendez assisted by getting duct tape, wire, and a blanket, (7) defendant told Roby that Roby did not deserve to live and that Roby was going to die, (8) codefendants put Roby in their car, (9) Mendez went

with defendant to a meeting, and (10) upon return Mendez was told not to “rat” to the police who were waiting for them.

Mendez pled guilty to charges arising as a result of the assault on Roby. Before the trial against Roby and codefendants commenced, the court conducted an Evidence Code section 403<sup>1</sup> hearing with Mendez and her attorney concerning the effect of Mendez’s plea on her obligation to testify if called as a witness against defendant. It was after this hearing, that the prosecution called Mendez as a witness where she testified to the foregoing. Defendant chose not to cross-examine Mendez, and agreed that she could be excused subject to recall. After Mendez’s testimony, Officer McLane testified to the foregoing.

Thereafter, defendant requested to recall Mendez as her first witness offering as a basis psychologist Thomas Bell’s opinion as to an interview with Mendez that she did not know what she was testifying to and did not understand her sworn oath. The court denied this request.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING  
DEFENDANT’S REQUEST TO RECALL MENDEZ**

Defendant claims that she should have been allowed to recall Mendez, as her first defense witness after Officer McLane testified for the prosecution, in order to elicit testimony and a psychological examination concerning the mental state and competence

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<sup>1</sup> All further statutory references are to the Evidence Code unless otherwise indicated.

of Mendez. The trial court refused to allow Mendez to be recalled finding defendant had ample opportunity to fully examine her. Section 778 provides: “After a witness has been excused from giving further testimony in the action, he [or she] cannot be recalled without leave of the court. Leave may be granted or withheld in the court’s discretion.” “[W]here a trial court has discretionary power to decide an issue, a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.” (*Adoption of D. S. C.* (1979) 93 Cal.App.3d 14, 24-25.)

Defendant contends that section 778 is inapplicable because Mendez was never “excused.” Instead, defendant maintains that because Mendez was expressly excused “subject to recall,” defendant is entitled to recall her as a matter of right. In support of this contention defendant cites section 774: “A witness once examined cannot be reexamined as to the same matter without leave of the court, but he [or she] may be reexamined as to any new matter upon which he [or she] has been examined by another party to the action. Leave may be granted or withheld in the court’s discretion.” We reject defendant’s contention. While it is clear that section 774 allows a party to recall and reexamine a witness as to any new matter, the decision to allow such recall rests within the discretion of the trial court. Accordingly, the mere fact that the trial court excused the witness subject to recall does not mean that the defendant is allowed to recall that witness as a matter of right pursuant to section 774. Likewise, section 778 limits the ability to recall a witness by vesting the trial court with the discretion to allow recall or

not. Because both of these sections leave it to the discretion of the trial court, we need not decide whether section 774 or 778 applies to the case at bar.

In the case at bar, the issue is why the trial court refused the request. Defendant did not attempt to elicit testimony and evidence as to the mental state and competence of Mendez until after the prosecution's case was finished. The trial court found that defendant had ample opportunity to present and elicit such evidence before Mendez was excused subject to recall, but without good cause failed to do so. Defendant did not present any evidence on this point to the trial court besides claiming that Mendez was not expected to testify. The trial court's rejection of this assertion is supported by the record. First, the fact that Mendez was on the prosecution's witness list and was taken through a section 403 hearing to determine the feasibility of her giving testimony, shows that defendant should have been aware and prepared accordingly for the eventuality that Mendez would testify.

Similarly, defendant's line of questioning of Officer McLane on cross-examination, after Mendez's testimony, shows that defendant was aware of the issue of Mendez's mental competence at the time of her testimony: "When you spoke to Ms. Mendez, would it be fair to say she's not the brightest [bulb]? [¶] . . . [¶] You saw her here today, and she really couldn't answer a question straight; correct? [¶] . . . [¶] Couldn't get a narrative out of her no matter how many times [the prosecutor] tried; correct?" The foregoing shows that defendant was aware of or had ample opportunity to be aware of the issue of Mendez's mental competence before she was excused subject to

recall. Thus, defendant was afforded ample opportunity to elicit testimony and evidence as to the matter concerning Mendez's mental competence before she was excused. Accordingly, it was within the trial court's discretion to deny defendant's request to recall Mendez as to that issue. Absent some showing that the trial court's determination that defendant had no good reason for failing to elicit evidence and testimony concerning Mendez's mental state and competence earlier in the case was erroneous, we cannot say there was any abuse of discretion.

Defendant relies on *People v. Thomas* (1992) 2 Cal.4th 489, 541-542, for the proposition that neither the Evidence Code nor case law authorizes prohibiting the defense in an action from calling a person as its own witness when that person has not been finally excused from testifying. Defendant's reliance is mislaid. In *Thomas*, the trial court properly exercised its discretion in denying a request to recall a witness pursuant to section 778. (*Thomas*, at pp. 541-542.) There is nothing in *Thomas* to support the proposition that the trial court does not have such discretion. Similarly, here there is no evidence that the trial court failed to exercise its discretion. The holding in *Thomas*, rather, stands for the proposition that it is within the trial court's discretion to allow the recall of a witness after the close of the prosecution's case in chief. (*Id.* at p. 542.) It does not advance defendant's contention.

Accordingly, the trial court did not abuse its discretion in denying defendant's request to recall Mendez as a witness because defendant had ample opportunity to elicit

testimony and examine Mendez on cross-examination regarding her statements to Officer McLane and her mental competence.

Moreover, even if we presume that the trial court erred in denying defendant's request to recall Mendez as a witness, the denial to recall a witness (1) whose intelligence was already brought into question by her demeanor and statements during her testimony and later in defendant's line of questioning on cross-examination of Officer McLane, (2) who was reluctant to be testifying, (3) who denied witnessing or participating in any assault on Roby, and (4) who denied ever talking to Officer McLane, could not possibly have affected the outcome. Roby's "fairly consistent" testimony and Officer McLane's testimony thereto were more than sufficient to lead a reasonable jury to convict defendant, even assuming defendant would have been successful in discounting Officer McLane's testimony as to Mendez's recollection of events through further examination of Mendez. Under any standard of review, the evidentiary ruling was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

### **DISPOSITION**

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

WARD

J.

GAUT

J.